Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1979

NO. 79-1002

WILLIAM C. MARCHIONDO,
Petitioner,

VS.

HONORABLE RICHARD B. TRAUB,
DISTRICT JUDGE
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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IN THE

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NO. 79-1002

WILLIAM C. MARCHIONDO
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VS.

HONORABLE RICHARD B. TRAUB,
DISTRICT JUDGE
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXCO

Respondents respectfully pray that a Writ of Certiorari not issue to review the mandate of the Supreme Court of the State of New Mexico.

OPINIONS BELOW

Petitioner, William C. Marchiondo, sought a Writ of Prohibition in the New Mexico Supreme Court against the Honorable Richard B. Traub, the Respondent. A copy of the Order entered by the Respondent and subject of the Writ of Prohibition is appended as Appendix A.

The New Mexico Supreme Court denied Petitioner's application for a Writ of Prohibition against the Respondent's Order. Appendix B.

JURISDICTION

Jurisdiction is claimed by Petitioner under 28 U.S.C. §1257(3).

The Mandate of the Supreme Court of the State of New Mexico which denied Petitioner's application for a Writ of Prohibition was entered on November 13, 1979. Petitioner did not file a Motion for Rehearing in accordance with Rule 19(a) of the New Mexico Rules of Appellate Procedure in Civil Cases. Petitioner did not file a Motion for Clarification on the grounds of the Mandate, pursuant to Rule 16 of the New Mexico Rules of Appellate Procedure in Civil cases.

QUESTION PRESENTED

Does the Federal Privacy Act, 5 U.S.C. §552a, apply, and if so, does it prohibit a state court from issuing an Order to the Federal Bureau of Investigation, requiring the Federal Bureau of Investigation to produce information in the possession of that agency, where:

1. The F.B.I. does not object or raise any statutory exemptions to the requested production of said information, nor does the F.B.I. object to the jurisdiction of the state court issuing the Order;

2. The state court issuing the Order is the same court, and in the same proceeding, in which the Petitioner filed a suit for libel; and he claims he is not now nor has he ever been associated in any way with organized crime;

3. The state court found good cause for production, and determined that the information being sought was reasonably calculated to lead to the discovery of admissible evidence;

4. The information sought was previously and voluntarily requested by Petitioner under a Freedom of Information Act request, and the F.B.I. agreed to release the information to the Petitioner pursuant to that request; but Petitioner claims that he does not now have said information in his possession;

5. Petitioner refuses to sign a consent or authorization for production of the requested information?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment XIV

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

Article VI

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

New Mexico Constitution, Article 6, §13.

Privacy Act of 1974, as amended, 5 U.S.C. Sections 552a, et seq.

STATEMENT OF THE CASE

On June 13, 1975, William C. Marchiondo instituted a libel action in New Mexico State District Court (District Court of the County of Bernalillo) against the corporate publishers and various officers and employees of the two

daily newspapers in Albuquerque, New Mexico. One of the corporate defendants is the Journal Publishing Company which publishes the *Albuquerque Journal*. A Supplemental Complaint alleging a new cause of action was filed on May 31, 1978. This cause of action was based upon a March 26, 1977 article published by the *Albuquerque Journal*. The article was originated by the Phoenix Project of the Investigative Reporters and Editors Group. The headline of this article was "Organized Crime Showing Interest In New Mexico", and a photograph of Mr. William C. Marchiondo appeared immediately below this headline on jump page A-16. Mr. Marchiondo has denied being associated with organized crime in any way, and he doubts that it exists.

Defendants answered these allegations by admitting publication of the articles in question, but they denied that the publications were defamatory, raised the defense of truth as to the published statements or inferences, and asserted that Mr. Marchiondo was a public figure so as to bring the action within the actual malice standard.

The case then entered its discovery stage. Respondent is the District Judge presiding in this libel action. The defendants scheduled the deposition of the local office of the Federal Bureau of Investigation, and caused to be issued to the F.B.I. a subpoena duces tecum. The subpoena duces tecum required the F.B.I. to produce at the deposition the following items, which are the subject of the case before this Court:

> All documents, records, files, or materials of every nature and description in the possession, custody or control of the Federal Bureau of Investigation which the Federal Bureau of Investigation has previously agreed to deliver to William C. Marchiondo, in compliance with a request made by William C. Marchiondo under and pursuant to the Federal Freedom and [sic] Information Act, Title 5 U.S.C.A. §551-556.

A copy of the subpoena is appended hereto as Appendix C.

The Federal Bureau of Investigation, through Assistant United States Attorney, Charles F. Sandoval, responded to the subpoena by filing a Motion in Respondent's court. The F.B.I.'s Motion raised no statutory exemptions to the information sought, but it claimed that the materials could not be disclosed except pursuant to the "order of a court of competent" jurisdiction. Also in the Motion the United States Attorney stated the subpoena duces tecum, as such, did not constitute an Order of the State District Court, and therefore an Order was needed. The Motion filed by the United States Attorney is appended as Appendix D.

On August 23, 1979 a hearing on the F.B.I.'s Motion was held before Respondent. At the hearing, Assistant United States Attorney Sandoval stated that the subpoenaed material, which is the subject of the case before this Court, would be produced for defendants if an Order to that effect was entered by the State District Court. No statutory exemption to the information was claimed, and no lack of jurisdiction was raised by the F.B.I. through the United States Attorney at the hearing.

The discovery Order by Respondent was entered and a copy is appended as Appendix A. Mr. Marchiondo sought an alternative Writ of Prohibition in the New Mexico Supreme Court to block enforcement of Respondent's Order. The Petition for Writ of Prohibition was denied on November 13, 1979 by the New Mexico Supreme Court. A copy of the order is appended as Appendix B.

Previously, on September 7, 1979 the New Mexico Supreme Court entered an Order, Appendix E, prohibiting enforcement of an Order, Appendix F, entered by Respondent. This Order entered by Respondent required Mr. Marchiondo to sign an authorization for release of information in possession of the Federal Government. Defendants filed a Motion for Clarification of this New Mexico Supreme Court Order. Appended as Appendix G. The Motion was taken under advisement pending the decision of the New Mexico Supreme Court on the Order which is now before this Court. The Motion for Clarification was rendered moot by a New Mexico Supreme Court Order, Appendix H, based upon its decision on the Order which is now before this Court.

ARGUMENT TO DENY WRIT OF CERTIORARI

The discovery Order before this Court only affects these two civil litigants; the principles of concurrent jurisdiction and court of competent jurisdiction have been established; the principle that the Privacy Act does not limit civil discovery is established; and the Respondent's Order conforms to the existing statutory and case law.

A. REVIEW OF A DISCOVERY ORDER

The discovery Order before this Court requires the production of only certain information which the Federal Bureau of Investigation had previously agreed to deliver to Petitioner, pursuant to a prior Freedom of Information Act request voluntarily made by Petitioner. Petitioner claims this information is not now in his possession. Appendix E to Petitioner's Brief for Certiorari. The discovery Order was not issued under or pursuant to the Freedom of Information Act. The Order is not an F.O.I.A. request. Despite Petitioner's claim, Respondent is not

enforcing the Freedom of Information Act. Petitioner's Brief for Certiorari at 9.

This case only presents discovery procedures between two private civil litigants in a libel suit. The F.B.I. is not objecting to the discovery Order as entered. The reference to F.O.I.A. in the Order was used to categorize the requested information, so that the F.B.I. could segregate out only those documents for production. The Order is not a request for any and all documents which the F.B.I. has ever obtained pertaining to the Petitioner. Therefore, Petitioner seeks to have this Court review discovery procedures in civil litigation. None of the elements for a Writ of Certiorari are thereby present.

B. PRIVACY ACT DOES NOT PREVENT DISCOVERY IN THIS CASE

Assuming the Privacy Act is applicable, it is straightforward. The only section before this Court is:

> (b) Conditions of disclosure. No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the records pertain, unless disclosure of the record would be . . .
>
> (11) pursuant to the order of a court of competent jurisdiction. 5 U.S.C. 552a(b) (11)

This section, 5 U.S.C. 552a(b) (11), of the Privacy Act, has been previously reviewed by lower courts, and the consistent result is that the Privacy Act does not prevent civil or criminal discovery. *United States v. Brown*, 562 F. 2d 1144 (9th Cir. 1977); *Stiles v. Atlanta Gas Light Company*, 453 F. Supp. 798 (N.D. Ga. 1978); *Christy v. United*

States, 68 F.R.D. 375 (N.D. Tex. 1975). Apparently, Petitioner overlooked the *Brown* and *Christy* decisions. The statute and the case law are not confusing or in conflict meriting review by this Court on a Writ of Certiorari.

C. CONCURRENT JURISDICTION AND COURT OF COMPETENT JURISDICTION

The F.B.I., in its Motion, raised the Privacy Act, 5 U.S.C. 552a(b) (11), and the Respondent issued his Order ordering the production of:

> All documents, records, files, or materials of every nature and description in the possession, custody or control of the Federal Bureau of Investigation which the Federal Bureau of Investigation has previously agreed to deliver to William C. Marchiondo, in compliance with a request made by William C. Marchiondo under and pursuant to the Federal Freedom and [sic] Information Act, Title 5 U.S.C.A. §551-556. Appendix A.

The state court in question is a court of original and general jurisdiction in the State of New Mexico. New Mexico Constitution, Art. 6, §13.

Petitioner agrees that the fundamental question of the existence of concurrent jurisdiction between the federal and state courts to enforce federal laws has long been established. Petitioner's Brief for Certiorari at 10. Petitioner, in referring to the phrase, "court of competent jurisdiction," rhetorically asks, "What does this phrase mean?" Petitioner's Brief for Certiorari at 12. This ground has already been plowed, and the meaning of the phrase, when used in federal laws, has long been established to include state courts of general jurisdiction. *Ruth v. Westinghouse Credit Co.*, 373 F. Supp. 468 (W.D. Okl. 1974); *Mid-*

Continent Pipeline Co. v. Hargrave, 129 F. 2d 655 (10th Cir. 1942); *Duval v. Protes*, 51 F. Supp. 967 (E.D. N.Y. 1942); *Powell v. Rhine*, 71 F. Supp. 953 (M.D. Penn. 1947); *Miller v. Municipal Court of City of Los Angeles*, 22 Cal. 2d 818, 142 P. 2d 297 (Sup. Ct. 1942); *Hall v. Chaltis*, 31 A. 2d 699 (D.C. Mun. Ct. App. 1947); *Stringer v. Griffin Grocery Co.*, 149 S.W. 2d 158 (Tex. Ct. Civ. App. 1941).

Section 552a(b) (11) became part of the Privacy Act when it was offered as an amendment by Congressman Caldwell Butler from Roanoke, Virginia. The Congressional Record, House, November 21, 1974, pg. 36955, reflects the amendment to the Act.

> Mr. BUTLER. Mr. Chairman, I offer an amendment. The Clerk read as follows:
>
> Amendment offered by Mr. Butler: Page 23, after line 25, Insert the following:
>
> '(9) pursuant to the order of a court of competent jurisdiction.'
>
> Mr. BUTLER. Mr. Chairman, this is an amendment to the section of the bill dealing with conditions of disclosure. It is introduced for the purpose of making is perfectly clear that a lawful order of a court of competent jurisdiction would be an appropriate condition of disclosure.

No other written legislative history exists concerning the amendment.

Petitioner would have this Court believe that Congressman Caldwell Butler's amendment to the Privacy Act is an exclusive grant of jurisdiction to the federal courts. Petitioner's interpretation is not correct. Well settled principles of federal jurisdiction prohibit such a finding.

It is a principle of importance that the federal courts are courts of limited jurisdiction. Most state courts are courts of general jurisdiction and the presumption is that they have jurisdiction over a particular controversy unless a showing is made to the contrary. The federal courts on the other hand cannot be courts of general jurisdiction. They are empowered to hear only those cases that (1) are within the judicial power of the United States, as defined in the Constitution [Article 3, Section 2], and (2) that have been entrusted to them by a jurisdictional grant by the Congress. *Wright & Miller Federal Practice and Procedure*, §3522, at pg. 44.

From the First Judiciary Act [of September 24, 1789 Stat. 76 §9], to the present, the Congress has provided in the Judicial Code, that in certain instances jurisdiction of the federal courts shall be exclusive of the courts of several states. Federal jurisdiction *is not exclusive unless the Congress chooses to make it so, either expressly or by fair implication. Wright and Miller Federal Practice and Procedure*, §3527, at pg. 120 (Emphasis added); See *Local 100 of United Ass'n of Journeymen and Apprentices v. Borden*, 373 U.S. 690, 83 S. Ct. 1423, 10 L. Ed. 638 (1963); *Charles Dowd Box Co. v. Courtney*, 28 U.S. 379, 82 S. Ct. 519, 7 L. Ed. 483 (1962).

It is readily apparent from several legislative acts that when Congress has intended to bestow exclusive jurisdiction on the federal courts, it has been done so with specificity and particularity. Examples of such specific and particular grants of exclusive jurisdiction are:

1. 28 U.S.C. §1334, where Congress provided:

   > The district courts shall have original jurisdiction, exclusive of the courts of the states of all matters and proceedings in bankruptcy.

2. U.S.C. §1338, where regarding patents, Congress provided:

   > The district court shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents . . . Such jurisdiction shall be exclusive of the courts of the states in patents. . . .

3. 18 U.S.C. §3231, where Congress explicitly provided:

   > The district court of the United States shall have original jurisdiction exclusive of the courts of the States, of all offenses against the laws of the United States.

These legal principles have long been established and do not give rise to a Writ of Certiorari.

D. CASE IS LIMITED ON ITS OWN FACTS

Petitioner states that, "In the circumstances present here, and given the nature of the case, concurrent jurisdiction between the states and federal courts would not be compatible." Petitioner's Brief for Certiorari at 11. A look at the "circumstances present here" reveals:

1. The F.B.I. and the United States Attorney's office raised no statutory exemptions to the information, nor did they oppose the jurisdiction of the state court;

2. The state court is the same court which Petitioner feels is "competent" to preside over his libel action. The court found good cause for the production of the documents, and determined that the information sought was reasonably calculated to lead to the discovery of admissible evidence;

3. The discovery Order is limited to materials, ". . . which the Federal Bureau of Investigation has previously agreed to deliver to William C. Marchiondo under and pur-

suant to the Federal Freedom and [sic] Information Act, Title 5 U.S.C.A. §551-556", Appendix A; and

4. Petitioner was requested, but refused to sign, an authorization or consent for the information;

What better case of "compatibility" could exist? The case before this Court raises no "hard" questions. This case is limited to its own facts by, ". . . the circumstances present here, and given the nature of the case, . . ." as stated by the Petitioner himself. Petitioner's Brief for Certiorari at 11. Because the case is limited to its own facts, it is not a case for a Writ of Certiorari.

E. STANDING OF MR. MARCHIONDO

On the one hand, Petitioner says his case is distinguishable from *Chrysler Corp. v. Brown*, ——U.S.——, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979), because Petitioner, ". . . asserts standing by virtue of the Privacy Act . . ." On the other hand, the thrust, if not the heart of the Petition, is the extrapolation and discussions of F.O.I.A. sections dealing with the procedures when an agency refuses to disclose information. The F.B.I. is not refusing to disclose the information.

The Freedom of Information Act is exclusively a disclosure statute, and it does not afford Petitioner any private right to enjoin agency disclosure. *Chrysler Corp., supra.* Petitioner agrees with these conclusions. Petitioner's Brief for Certiorari at 8.

Paragraph B. under Reasons to Grant the Petition, is labeled, "Jurisdiction of State Courts to Enforce F.O.I.A." Petitioner's Brief for Certiorari at 9. If Petitioner is asserting a claim under F.O.I.A. he has no standing to do so.

If Petitioner is here under the Privacy Act he should limit his argument to the Act and standing would not be an issue. Just because the requested material was at one time previously and voluntarily requested by Petitioner, under the F.O.I.A., does not give him standing under the Privacy Act. *Chrysler Corp., supra.*

F. DISCOVERY ORDER LACKS FINALITY

Petitioner, William C. Marchiondo, claims jurisdiction under 28 U.S.C. §1257 which provides for review by appeal or Certiorari from "final judgments or decrees rendered by the highest courts in the state in which decisions could be had . . .". Petitioner's Brief for Certiorari at 2. The Order before this Court is a discovery Order.

It has long been recognized that discovery Orders are not "final" judgments so as to be appealable prior to the final disposition of the underlying case. *Alexander v. United States*, 201 U.S. 117, 26 S. Ct. 356, 60 L. Ed. 686 (1906); *Cobbledick v. United States*, 309 U.S. 323, 60 S. Ct. 540, 84 L. Ed. 783 (1940); *United States v. Ryan*, 402 U.S. 530, 91 S. Ct. 1580, 29 L. Ed. 2d 85 (1971).

CONCLUSION

Based upon the foregoing reasons, Respondent respectfully prays that this Court deny the Petition for a Writ of Certiorari.

RESPECTFULLY SUBMITTED,

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APPENDIX A

IN THE DISTRICT COURT OF
BERNALILLO COUNTY
STATE OF NEW MEXICO

WILLIAM C. MARCHIONDO,
Plaintiff,

vs. No. 6-75-02838

ROBERT A. BROWN, et al.,
Defendants.

ORDER

THIS MATTER having come before this court for Hearing on August 23, 1979 on the Motion by Charles F. Sandoval, Assistant U.S. Attorney, filed on July 5, 1979, pertaining to Paragraph 1 of the Subpoena Duces Tecum issued to Forrest Putman, et al., on June 30, 1979, and the Court having heard argument of counsel, and having reviewed the records, FINDS THAT:

1. Good cause exists for the Federal Bureau of Investigation to produce the materials specified in Paragraph 1 of defendants', Albuquerque Journal, Albuquerque Publishing Company, Tom Lang, Jerry Crawford, and Eric McCrossen, Subpoena Duces Tecum issued on June 30, 1979 and directed to Forrest Putman, et al., as follows:

> "All documents, records, files, or materials of every nature and description in the possession, custody or control of the Federal Bureau of Investigation which the Federal Bureau of Investigation has previously agreed to deliver to William C. Marchiondo, in compliance with a request made by William C. Marchiondo under and pursuant to the Federal Freedom and Information Act, Title 5 USCA, §§ 551-556."

2. Good cause exists that the expeditious production of said materials, specified in Paragraph 1 above, for purposes of

inspection and/or copying by the parties herein, shall be at the offices of the Federal Bureau of Investigation or U.S. Department of Justice, in Albuquerque, New Mexico.

3. The production of said materials as specified in Paragraph 1 above appears reasonably calculated to lead to the discovery of admissible evidence.

APPENDIX B

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO

WILLIAM C. MARCHIONDO,
Petitioner,

vs. NO. 12,740

HON. RICHARD B. TRAUB,
Respondent.

ORDER

PER CURIAM.

On October 3, 1979, petitioner, William C. Marchiondo, filed a petition for writ of prohibition directed against respondent, Richard B. Traub, District Judge, requesting this Court to prohibit the respondent from enforcing two orders entered by it on October 2, 1979, as follows: (1) an order directing the Federal Bureau of Investigation to produce all materials, records and files in the possession and custody of the Federal Bureau of Investigation which it had delivered or agreed to deliver to petitioner at petitioner's request under the Freedom of Information Act, Title 5, U.S.C.A. §§ 551-556 (See § 552), and (2) an order directing the New Mexico State Police and the Albuquerque Police Department to produce certain investigative materials concerning plaintiff and providing for implementation.

On October 10, 1979, this Court held a hearing on the writ, took the case under advisement and ordered the parties to file simultaneous briefs on the issue of whether a State court is a "court of competent jurisdiction" as it pertains to the Freedom of Information Act and the Privacy Act of 1974, Title 5, U.S.C.A. § 552a(b) (11).

After having considered arguments by counsel and the briefs submitted on behalf of each of the parties, it is the opinion of this Court that a State court is a "court of competent jurisdiction" as that term is used within the Free-

dom of Information Act and the Privacy Act of 1974 and that the alternative writ of prohibition heretofore taken under advisement is denied, and the stay issued pending this determination is set aside.

IT IS THEREFORE ORDERED THAT the Federal Bureau of Investigation shall expeditiously produce all the materials as specified in Paragraph 1 above, for inspection and/or copying by the parties herein, and said production shall be at the offices of the Federal Bureau of Investigation or U.S. Department of Justice in Albuquerque, New Mexico.

APPENDIX C

SUBPOENA
DUCES TECUM

In the District Court of the Second Judicial District
in and for the County of Bernalillo, State of New Mexico

CASE No. 6-75-02838

WILLIAM C. MARCHIONDO,
Plaintiff,

vs.

ROBERT L. BROWN, et al,
Defendants.

THE STATE OF NEW MEXICO

To

Forrest Putnam, or that employee or representative of the Federal Bureau of Investigation whom the Federal Bureau of Investigation shall designate to appear and testify in its behalf,

Federal Office Building, 5th. & Gold S.W., Albuquerque, New Mexico.

PLEASE BRING WITH YOU: (1) All documents, records, files, or materials of every nature and description in the possession, custody or control of the Federal Bureau of Investigation which the Federal Bureau of Investigation has previously agreed to deliver to William C. Marchiondo, in compliance with a request made by William C. Marchiondo under and pursuant to the Federal Freedom and Information Act, Title 5 USCA, §§ 551-556.

(2) All materials, including, but not necessarily limited to, all transcriptions of intercepted communications which the Federal Bureau of Investigation has previously agreed to deliver to or hold for review by William C. Marchiondo or by Valentino Torres and

which William C. Marchiondo and Valentino Torres filed a Motion to obtain or review in the proceeding entitled, IN THE MATTER OF AN APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS, NO. NDC-50, UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, in which proceeding the Motion, a copy of which is attached hereto as Exhibit "A" and is incorporated herein by reference, and the Government's Response to Interceptees Motion for Disclosure of Intercepted Communications, copy of which is attached hereto as Exhibit "B" and is incorporated herein by reference, were filed.

————————, Greeting:

We command you, and each of you, to be and appear before a Court Reporter of the office, of Proctor and Potts, at Suite 304, Sandia Savings Building, Albuquerque, New Mexico on JULY 9, 1979 at the hour of 8:30 A.M. of said day to have your disposition taken. And this do ye under penalty of the Law.

WINESS, the HONORABLE RICHARD TRAUB, Judge of said Court, and the seal thereof this 30th day of June, 1979.

(Seal) ELOISE E. YOUNG, Clerk

By /s/————————Deputy

NOTE: Supoena isued at request of JOHNSON AND LANPHERE, P.C., Attorney for Defendants, Address: 6400 Uptown Blvd. N.E., Suite 200 W, Albuquerque, New Mexico, Telephone Number: 881-3333

STATE OF NEW MEXICO)
) ss.
County of Bernalillo)

George H. Barrows being duly sworn, upon his oath says, I am over the age of eighteen years, I served the within

subpoena by delivering a copy thereof, in the county aforesaid, in person to Forrest Putman Federal Bldg on July 2, 1979

Fees: /s/————————

Subscribed and sworn to before me this 7th day of July, 1979

My Commission Expires
March 5, 1983 /s/————————
NOTARY PUBLIC

APPENDIX D

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
IN THE DISTRICT COURT

WILLIAM C. MARCHIONDO,)
Plaintiff,
vs.) No. 6-75-02838
ROBERT L. BROWN, et al.,)
Defendants.

MOTION

Comes now the United States of America by R. E. Thompson, United States Attorney for the District of New Mexico, and Charles F. Sandoval, Assistant United States Attorney for said District, and on behalf of the Federal Bureau of Investigation would show the Court:

1. The Privacy Act of 1974, 5 U.S.C. 552a(b) (11) requires that the records requested here not be disclosed except in response to the order of a court of competent jurisdiction.

2. The subpoena duces tecum does not by itself qualify as the order of a court of competent jurisdiction.

3. If this Court determines that an order should issue here, an additional forty-five days from July 9, 1979, would be needed in order to comply with the administrative provisions found in 28 CFR 16.21 *et seq.*

WHEREFORE, the movant prays that if an order is entered requiring compliance with the subpoena duces tecum herein, the movant be given until August 23, 1979, to comply.

APPENDIX E

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Friday, September 7, 1979

NO. 12,586

WILLIAM C. MACHIONDO,
Petitioner,
vs. Original Prohibition Proceeding
RICHARD B. TRAUB, District Judge,
Respondent.

This matter coming on for consideration by the Court upon amended alternative writ of prohibition, and the Court having considered the matter and taken the same under advisement;

NOW, THEREFORE, IT IS ORDERED that the amended Alternative Writ of Prohibition heretofore issued in this matter on July 25, 1979 be and the same is hereby made permanent, Mr. Chief Justice Sosa, Mr. Justice Easley and Mr. Justice Federici concurring; Mr. Justice Payne dissenting; Mr. Justice Felter not participating.

APPENDIX F

IN THE DISTRICT COURT OF
BERNALILLO COUNTY
STATE OF NEW MEXICO

WILLIAM C. MARCHIONDO,
Plaintiff,

vs. No. 6-75-02838

ROBERT A. BROWN, et al.,
Defendant.

ORDER

The defendants, Robert A. Brown, Thompson H. Lang, Albuquerque Publishing Company (N.S.L.), Journal Publishing Company, a corporation, Malcolm Bolles, Eric McCrossen and Jerry Crawford, have filed herein discovery motions for an Order which orders the plaintiff, William C. Marchiondo:

1. To produce and to execute an Authorization permitting movants to obtain from specified governmental agencies any materials which plaintiff has heretofore obtained from the said agencies named under and pursuant to the Federal Freedom of Information Act and Privacy Act, Title 5 U.S.C.A., §§555-556. [sic]

2. To execute an Authorization permitting movants to obtain from the above said governmental agencies any materials which plaintiff has the legal right to obtain from the said agencies, whether or not in fact previously sought or obtained by plaintiff, under and pursuant to the Federal Freedom of Information Act and Privacy Act, Title 5 U.S.C.A. §§551-556.

3. To execute an Authorization permitting movants to obtain from the appropriate governmental agency or court in custody or possession thereof, of wiretap recordings or transcripts of such recordings, of conversations between plaintiff and others or between others and concerning plaintiff, obtained or recorded pursuant to any Court Order

permitting such wiretaps, where such Order was made and entered pursuant to Title 18 U.S.C.A., §§2510-2520.

4. To Execute an Authorization permitting movants to obtain from the appropriate governmental agency or Court in possession thereof, of body microphone recordings or transcripts of body microphone recordings of conversations between James Napoli and plaintiff or between James Napoli and others concerning plaintiff or concerning any interest of James Napoli in matters relating or pertaining to the State of New Mexico, and which were recorded during the time that James Napoli was incarcerated in The Tombs correctional facility in New York City, New York during 1974 or 1975.

These motions having come on for hearing before the Court on June 8, 1979, and the Court having reviewed and considered the memorandum briefs of the parties, the oral arguments of the parties and the affidavits submitted in connection therewith, and otherwise being fully advised in the premises, FINDS:

1. That, based upon the Affidavit of the plaintiff, William C. Marchiondo, that he does not at this time have actual possession or custody of any materials which he may heretofore have been entitled to receive pursuant to the Federal Freedom of Information Act and Privacy Act, Title 5 U.S.C.A., §§551-556, that portion of the motions referred to in paragraph numbered 1, above, should be denied.

2. That as to the portion of the motions referred to in paragraphs numbered 2, 3, and 4, above:

(a) The movants have shown good cause as to why they should be entitled to obtain the materials, documents, recordings or transcripts of recordings referred to.

(b) The materials, documents, recordings or transcripts of recordings referred to are or would reasonably contain matters relevant to this lawsuit and are such as to appear reasonably calculated to lead to the discovery of admissible evidence, but that the materials, documents, re-

cordings or transcripts of recordings should be immediately, and prior to any review therof by defendants, their representatives or attorneys, delivered to this Court for an in camera determination by this Court, prior to releasing them to defendants' attorneys, as to whether there exists or is contained within such materials, documents, recordings or transcripts of recordings anything

(i) which unreasonably invades the personal privacy of plaintiff;

(ii) which violates the attorney-client privileges of any client of plaintiff;

(iii) or which is otherwise irrelevant or is not reasonably calculated to lead to the discovery of admissible evidence in this case.

(c) That the movants have reasonably designated that which they seek to obtain with as much specificity as circumstances permit and with, in any event, sufficient specificity as to comply with the New Mexico Rules of Civil Procedure when considered and controlled by the in camera review referred to above.

(d) That neither the Federal Freedom of Information Act and Privacy Act, Title 5 U.S.C.A., §§551-556, nor Title 18 U.S.C.A., §§2510-1520, creates any privilege against disclosure insofar as a privilege which may be asserted by plaintiff in this civil libel action, or, even if such privilege otherwise exists, such privilege, if any, insofar as being a privilege assertable by plaintiff, must, in balancing any such privilege against (i) the relevancy of the materials sought, (ii) the movants' inability after in fact independently seeking to obtain such materials, documents, recordings or transcripts of recordings from any other source or by any other method, which the Court specifically finds has been unsuccessful, (iii) the fact, which the Court specifically finds to be a fact, that the matters sought go to the heart of the issues in this case, and, (iv) the fact that this is a libel case action in which plaintiff asserts that he was libeled by defendants through defendants' alleged publication of words or of plaintiff's photograph in such a manner as to create

the impression that plaintiff was associated with organized crime, all weigh in favor of requiring the relief herein granted and, in balance, require the relief granted herein.

(e) That any privilege which may legally exist in favor of any federal, state or local governmental agency, under any statute or at common law, and which is properly assertable by such agency, is specifically not ruled upon by this Court for the reason that no such agency is before this Court asserting such privilege, and nothing in this Order is intended or should be construed from preventing any such agency from raising any claim of privilege personal to it or to them or, if applicable, assertable by it or them on behalf of plaintiff, in any proceeding instituted by movants to procure, by subpoena, motion or otherwise, the materials, documents, recordings or transcripts of recordings in question.

(f) That defendants, in instituting any proceeding to procure, by written request, subpoena, motion or otherwise, the materials, documents, recordings or transcripts of recordings in question, should immediately notify plaintiff and his attorneys thereof so as to enable plaintiff to intervene or to otherwise participate in such proceeding as plaintiff is otherwise legally entitled to intervene or participate, and to assert any reason or argument against disclosure which plaintiff might be entitled to then and there advance, but subject to the finding of this Court, and insofar as such findings would be pertinent to the issues before any other Court, agency or tribunal.

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff, William C. Marchiondo, will, on or before July 2, 1979, 4:30 p.m., execute in favor of movants, Robert A. Brown, Thompson H. Lang, Albuquerque Publishing Company (N.S.L.), Journal Publishing Company, a corporation, Malcolm Bolles, Eric McCrossen and Jerry Crawford, and their attorneys, Johnson and Lanphere, P.C., an Authorization in the form attached hereto as Exhibit "A", and incorporated herein by reference.

2. The materials, documents, recordings and transcripts of recordings obtained by movants pursuant to this Order will, prior to the review of same by any movant or any representative or attorney of movant, be delivered to this Court for an *in camera* inspection and review thereof by this Court and by the plaintiff or his attorneys of record, to determine if there is contained within such materials, documents, recordings or transcripts of recordings any matters, the disclosure of which (i) unreasonably invade the right of privacy of plaintiff, (ii) the disclosure of which would violate the attorney-client privilege of any client of plaintiff, or (iii) which is otherwise irrelevant or is not reasonably calculated to lead to the discovery of admissible evidence in this case.

3. That the movants, upon initiating any proceeding or request for any of the materials, documents, recordings or transcripts of recordings referred to in Exhibit A, whether by written request, subpoena, motion or otherwise, shall give timely notice to plaintiff and his attorneys so as to enable plaintiff and his attorneys to intervene or to otherwise participate in such proceedings as plaintiff is otherwise entitled to participate or intervene, and to assert any reason or argument against disclosure, but that in any such proceedings the findings of this Court may be presented and relied upon by movants to the extent that such findings may be pertinent to the issues presented to any agency, court or tribunal.

4. That prior to ruling upon any right of privacy, attorney-client privilege or relevancy arising out of the *in-camera* inspection and review of the materials delivered to this Court, plaintiff, based upon his own review or that of his attorneys, provided for in this Order, may again raise any assertion of privacy, atorney-client privilege or relevance as his or his attorneys' review and inspection may dictate as is appropriate, and this Court will consider and rule upon each such assertion or allegation prior to releasing any material, document, recording or transcript of recording, or portion thereof, so delivered to the Court, to movants and their attorneys.

IN THE DISTRICT COURT OF
BERNALILLO COUNTY
STATE OF NEW MEXICO

WILLIAM C. MARCHIONDO,
Plaintiff,

vs. No. 6-75-02838

ROBERT A. BROWN, et al.,
Defendants

AUTHORIZATION

I, William C. Marchiondo, plaintiff in the above captioned and numbered cause, do hereby authorize Johnson and Lanphere, P.C., 6400 Uptown Blvd. NE, Suite 200 West, Albuquerque, New Mexico, or any employee thereof, to obtain from any federal, state or local governmental agency or from any court, having possession, custody or control thereof, the following:

1. All materials or documents which I personally would have the legal right to obtain from:

(a) The Federal Bureau of Investigation.
(b) The Federal Drug Enforcement Agency.
(c) The United States Department of Justice
(d) The Federal Alcohol, Tobacco and Firearms Control Agency.

under or pursuant to a request, duly filed by me, under and pursuant to the Federal Freedom of Information Act and Privacy Act. Title 5 U.S.C.A., §§551-556.

2. All recordings or transcripts of recordings which I might personally obtain in a request or in a motion duly made or filed with any governmental agency or court of competent jurisdiction and which recordings are of conversations between myself and others or which were between others and make reference to me or about me, and which were made or recorded pursuant to a Court Order entered under and pursuant to Title 18 U.S.C.A.: §§2510-2520.

3. All recordings or transcripts of recordings made by means of a body microphone and recording device of conversations between myself and James Napoli, or conversations between James Napoli and others which mention or refer to me or to any interest of James Napoli in any event which has occurred or would occur within or affecting the State of New Mexico, and which were recorded while James Napoli was incarcerated in The Tombs correctional facility in New York, New York in 1974 or 1975.

This authorization is given pursuant to a Court Order entered on or about June 21, 1979, in Cause No. C-75-02838 in the District Court of Bernalillo County, New Mexico, entitled "William C. Marchiondo, Plaintiff, vs. Robert A. Brown, et al.", a copy of which Order is attached hereto as Exhibit I and is incorporated herein by reference, and this authorization is given subject to all of the matters set forth in the said Exhibit I.

Date this ——— day of ———, 1979, at Albuquerque, New Mexico.

WILLIAM C. MARCHIONDO

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

WILLIAM C. MARCHIONDO, being first duly sworn upon his oath, states: That he is the plaintiff in the above entitled matter; that he has read the foregoing Authorization and knows the contents thereof, and that the same is true of his own knowledge and information.

SUBSCRIBED AND SWORN TO before me this ——— day of ————, 1979.

NOTARY PUBLIC

My Commission Expires:

APPENDIX G

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

WILLIAM C. MARCHIONDO,
Petitioner,
vs. No. 12,586
RICHARD B. TRAUB, District Judge Division XI, Second Judicial District, State of New Mexico,
Respondent.

MOTION FOR CLARIFICATION OF THE RULING OF THE SUPREME COURT OF NEW MEXICO BY MEANS OF A WRITTEN OPINION, OR, ALTERNATIVELY, FOR A REHEARING

Comes now the respondent, by and through the real parties in interest, Robert A. Brown, Thompson H. Lang, Albuquerque Publishing Company (N.S.L.), Journal Publishing Company, Malcolm Bolles, Eric McCrossen and Jerry Crawford, and respectfully moves this Court as follows:

I

For clarification of the ruling of this Court in making permanent the Amended Alternative Writ of Prohibition entered in this matter on July 25, 1979, which ruling, sought here to be clarified, was entered in this Court on September 7, 1979. Movants specifically request that the clarification of the said ruling be made by and through a written opinion of this Court setting forth the grounds upon which the said ruling was based.

In support hereof, movants would show to the Court that the original Writ of Prohibition was sought by petitioner on multiple grounds, which asserted a broad spectrum

of legal theories, some arising under common law principles, some as arising under rules of this Court, some as arising under the New Mexico Rules of Civil Procedure, and some as arising under federal statutes. Petitioner conceded in his Brief in Chief that the issues, in any event, involved a matter of public interest requiring resolution at the earliest possible moment. The present status of the record leaves the parties and the trial court in confusion as to the basis for the ruling of this Court and the status of the record is also such that movants are effectively precluded from seeking a Writ of Certiorari in the Supreme Court of the United States because of the impossibility of demonstrating to the Supreme Court of the United States that the issue before this Court was decided upon any federal ground, or, conversely, that it was not decided upon an adequate and independent state ground.

II

Alternatively, the movants would request a rehearing pursuant to Rule 19 of the Rules of Appellate Procedure for Civil Cases and Rules Governing Original Proceedings in the Supreme Court. In support of this alternative motion. the movants would show to the Court as follows:

1. This Court has misapprehended the law governing the power of a New Mexico District Judge to implement his discovery orders by logical and reasonable directives consistent with the underlying purposes of the rules of discovery and the inherent power of a Court to do all things that are reasonably necessary for the administration of justice within the scope of their jurisdiction.

2. This Court has misapprehended the law relative to any purported privilege arising under or pursuant to the Federal Freedom of Information Act - Privacy Act, 5 U.S.C., Sec. 551, et seq., under and pursuant to the Federal Act Governing Wire Interception and Interception of Oral Communications, 18 U.S.C., Secs. 2510, et seq., and the law relating or pertaining to interceptions of oral communications involving a consenting party.

3. This Court has misapprehended the law relating to the jurisdiction of a district court of the State of New Mexico over discovery matters in aid of its jurisdiction in civil matters.

(a) *Procedural Basis for Motions*

The procedural basis relied upon by movants to file the alternative motion set forth above is asserted under both Rule 16, Rules of Appellate Procedure for Civil Cases, and Rules Governing Original Proceedings in the Supreme Court, and Rule 19 of the same Rules.

Movants interpret Rule 16 as requiring a supporting brief and interpret Rule 19 as permitting a supporting brief. The brief is, therefore, being separately but simultaneously filed herewith.

APPENDIX H

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

WILLIAM C. MARCHIONDO,
Petitioner,

vs. No. 12,586

RICHARD B. TRAUB, District
Judge, Division XI, Second
Judicial District, State
of New Mexico,
Respondent.

ORDER

PER CURIAM:

On September 7, 1979, this Court entered an order making the amended writ of prohibition permanent. On September 18, 1979, respondent filed a motion for clarification, or in the alternative, for a rehearing. On October 4, 1979, this Court entered an order granting the motion for clarification, but taking the matter under advisement pending further order of the Court.

This Court now having considered the motion for clarification further, it is ordered that the previous order of October 4, 1979, granting the motion for clarification is revoked and said motion is now denied on the grounds that the basis of the motion has been rendered moot by order of this Court in Cause No. 12,740.